A LETTER

To a PROPRIETOR of a FISHERY

In the RIVER THAMES.

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TO

A PROPRIETOR OF A FISHERY

IN THE RIVER THAMES,

In which an Attempt is made to shew in whom the Right of Fishing in Public Streams now resides.

THE SECOND EDITION, CORRECTED AND ENLARGED.

AN APPENDIX OF ADJUDGED CASES,

AND OTHER DOCUMENTS.

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*THE following Letter contains the ſubſtance of a Speech intended to have been made at a Public Meeting of the Proprietors of Fiſheries in the River Thames, on the 4th of July, 1787, and was occaſioned by a hint given at a former meeting by a * Gentleman to whoſe public ſervices the county of Berks is peculiarly indebted.*

* Penyſton Portlock Powney, Eſq.

A LETTER, &c.

SIR,

YOU have desired my opinion on the question, which has been lately much agitated in this neighbourhood, respecting the right of fishing in the river Thames, and as I always take pleasure in complying with your requests, I shall give you my thoughts on that subject in the best manner I am able.

The question to be determined, is, *Whether the proprietors of fisheries in the river Thames have an* EXCLUSIVE *right to them, and such as may and ought to be supported in opposition to the claim lately set up in favour of the public at large?* This is now become a question of great importance to the proprietors, some resolutions of a meeting lately held at Henley upon Thames having been published, in which it

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is asſerted that the "*Right of fiſhing in the river Thames is a public privilege and common to all.*" * It appears however by a ſubſequent advertiſement that the ſentiments of the Henley Meeting are ſomething moderated reſpecting what they term *a Public Privilege—Angling only* being there inſiſted on, and not *Fiſhing in general*, as in their former advertiſement.

I was not preſent at any of the meetings of that aſſociation, but from the reſpectable name given as the chairman, I am convinced that ſome arguments muſt have been uſed, which, for the time, had weight ſufficient to induce him to ſtand forth ſo conſpicuouſly as he has done in ſupport of the doctrine publiſhed as the ſenſe of thoſe meetings.

On what grounds the Reſolutions of the Henley aſſociation were formed, I am yet to learn; but the principal arguments I have ever heard advanced in favour of the *Public Right of Fiſhing in Public Streams* (and here I mean to include *Angling*, as well as every other mode of catching or deſtroying fiſh), have been drawn from a *miſconſtruction* (as it ſeems to me) of the 16th chapter of the Magna Charta, 9th Henry III. and I ſhall therefore in this letter,

* Appendix No. I.

with

with all due deference and reſpect to the great authorities, from whom I have ventured to differ, humbly attempt, amongſt other things, to eſtabliſh an explanation of that chapter different from what is given in the 2d Inſtitute, and which, upon the authority of Sir Edward Coke, has been commonly received as law upon this ſubject.

To the *admirers* of Sir Edward Coke, and in that deſcription I muſt include the whole *profeſſion of law* in this kingdom, it may be neceſſary to apologize for the liberty taken by an obſcure country attorney in differing with one, who, on moſt occaſions may ſafely be conſulted and relied on as an *oracle* in our law. No one pays more willing homage to that great man than I do; but great as my reſpect is, I ſhall be excuſed, I hope, in profeſſing to feel a much higher veneration for the *truth* wherever I may chance to find it. "Amicus Plato, amicus Socrates, ſed magis amica Veritas."

But to detain you no longer from the principal ſubject of my letter, which I intend to treat in the following order:

1ſt. I ſhall ſhew in whom the *common law right* of fiſhing in public rivers reſided at and before the making of Magna Charta.

2d.

2d. I shall consider how that *common law right* was affected by Magna Charta, and humbly attempt an explanation of the 16th chapter in the *charter of confirmation* of 9 Hen. III. different from that given in the 2d Institute.

3d. I shall adduce some modern authorities in which the ancient *common law right* to those fisheries has been recognized and established.

And lastly, I shall point out some errors which have been entertained on this subject, and endeavour to correct them.

I. And first I am to attempt shewing in whom the *common law right* of fishing in public rivers resided, at and before the making of Magna Charta.

Sir Matthew Hale * tells us that "Fresh rivers of *what kind soever* do of *common right* belong

* It is to the labours of the learned and ingenious Mr. Hargrave that I am indebted for the information given on this subject by the GREAT SIR MATTHEW HALE, whose learned Tract de Jure Maris et Brachiorum ejusdem, has been lately published by Mr. Hargrave in a quarto volume of Law Tracts, from which the curious reader may derive much valuable information on this and other subjects.

to the *owners of the ſoil adjacent*, ſo that the owners of the one ſide have of *common right* the propriety * of the ſoil and *conſequently the right of fiſhing*, uſque filum aquæ; † and the owners of the other ſide the right of ſoil or ownerſhip and fiſhing unto the *filum aquæ* on their ſide; and if a man be owner of the land on *both* ſides in *common preſumption* he is owner of the whole river and hath the *right of fiſhing* according to the extent of his land in length," and he adds, "with this agrees the common experience."

In ſupport of this definition of the common right of fiſhing, Sir Matthew Hale cites a record of the time of Edward 1ſt. which contains a deciſion at that early period on the right of fiſhing in the water of Idell, ‡ and is as follows.

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* *Proprity* is often uſed by our legal writers, as ſynonimous to *Property*.

† Filum aquæ is the midſtream of a river.—Lord Manſfield, in the caſe of Carter and Murcot cited below, with his uſual accuracy, calls it "Filum medium aquæ."

‡ The river Idell riſes in Nottinghamſhire, and falls into the *Dun*, beyond Axeholme Iſland, on the borders of Lincolnſhire, commonly called Haxey Iſland.

"Mich. 18, 19. Ed. 1. 13. Rot. Nott. Juratores dicunt quod predictus Hugo non tenet predictam piſcariam in ſeparali ſuo, ſimul cum Roberto Mortayn; quia dicunt quod omnes qui tenent *terras abuttantes ſuper aquam illam* in ea piſcantur pro voluntate ſua uſque filum aquæ ſicut illi de Grenely ex parte orientali et illi de Stratford ex parte occidentali. Dicunt etiam quod quædam pars ville de Stratford eſt de feodo de Lancaſtria *abuttans ſe ſuper aquam prædictam*, et ipſi de feodo illo piſcantur uſque filum aque. Hugo in Miſericordia."

The general rule reſpecting the right I am now ſpeaking of, was certainly conformable to the definition of Sir Matthew Hale, but this, like moſt other general rules will be found to have its exceptions—and the ſame authority informs us that *"ſpecial uſage may alter the common preſumption, for one man may have the river and ſoil thereof, and another the free or ſeveral fiſhery in that river."——But from this exception no argument can be drawn in favour of the right of the public at large, on the contrary they are ſhut out from their pretended privilege as well by the *exception* as they were by the *general rule*, for the caſe ſtands thus:—*In general* the owners of the lands on the

* Tract de jure, &c. p. 2.

banks

banks of freſh rivers of what kind ſoever have the *right to the fiſhery*, but in ſome *particular inſtances* that right is veſted in *ſome other individual*; therefore, where theſe particular inſtances do not interfere, the general common law doctrine takes place in favour of ſuch land owners, to the excluſion of the public at large.

Bracton lib. 1, cap. 12, ſ. 6,—tells us, "*quod publica* ſunt omnia *Flumina et Portus*, ideoque *Jus Piſcandi* omnibus commune eſt in Portu et in Fluminibus. Riparum etiam uſus publicus eſt *jure gentium ſicut ipſius fluminis*. Itaque Naves ad eas applicare funes arboribus ibi natis religare, onus aliquod in iis reponere cuivis liberum eſt, ſicut per ipſum fluvium navigare. Sed proprietas earum, illorum eſt quorum Prædiis adherunt, et eadem de cauſa arbores in eiſdem natæ eorundem ſunt. *Sed hoc intelligendum eſt de fluminibus perennibus; quia Temporalia poſſunt eſſe privata.*"

The diſtinction here made between *perpetual* and *temporary* rivers, I have not met with by thoſe names in any other book; but if this paſſage is to be admitted as part of our law, the former expreſſion may perhaps be conſtrued to mean *rivers conſtantly navigable*, the latter *private ſtreams*. But the above paſſage and ſome other from Bracton, which are quoted by Sir Mat-

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thew Hale, are by him attributed to the *civil law*, * and not to the law of England. It would be otherwiſe difficult to account for the caution with which *Bracton* ſpeaks of the private right in *temporary* rivers, as he calls them, if by ſuch he means *private* ſtreams, for Bracton was one of the *Juſticiarii itinerantes* in this kingdom at or about the time of the deciſion in the record quoted above, and cannot be ſuppoſed to have been ignorant what was held to be the *common law* on the queſtion, at that time. HALE, we have ſeen, veſts the right to the fiſheries in "freſh rivers of what kind ſoever," in the owners of the lands on the banks, and in ſupport of that doctrine has produced the higheſt ſpecies of evidence known in our law.† I ſhall not therefore heſitate to

* Hale de Jure Maris, fo. 28.—See alſo Sir Wm. Blackſtone's Introductory Lecture to his Commentaries, pa. 22, 8vo. edit. and Bp. Nicholſon's Engliſh Hiſtorical Library, pt. 3d. fo. 182. Edit. 1776. In this latter book there is avery ſtrong additional reaſon given for doubting the authority of *Bracton* in caſes where he is contradicted by others of our law writers, for he ſays that the ſeveral manuſcripts of that author were ſo interlined with the private ſentiments of others, that it was difficult to get at the genuine text.

† Records are the memorials of the Legiſlature, and of the King's Courts of Juſtice, and are authentic beyond all manner of contradiction; for there can be no greater demonſtration in a Court of Juſtice than to appeal to its own tranſactions."
Buller's, Niſi Prius. Part 6.

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adopt the law as laid down by him on this ſubject, in preference even to Bracton, reſpectable as his authority may on other occaſions be found to be. However, if my explanation of the diſtinction he has made between *perennial or perpetual and temporary rivers* may be received, there will not be found ſo much difference in the ſentiments of our two authors as may at firſt ſight appear to be, and both will be found to coincide with the modern deciſions on the ſubject.

This excluſive right of fiſhing is called in our law books by the names of *free fiſhery* and *ſeveral fiſhery*, but our lawyers are by no means agreed on the true diſtinction between the two terms. Sir William Blackſtone * calls a *free fiſhery* an *excluſive right* of fiſhing in a public river, and ſays it differs from a *ſeveral fiſhery*, becauſe he that has a *ſeveral fiſhery* muſt alſo be the *owner of the ſoil* which in a *free fiſhery* is not requiſite,—and that it differs alſo from *a common of piſcary*, which he had before defined † to be *a liberty of fiſhing in another man's water*, in that the free fiſhery is an *excluſive right*; the common of piſcary is not ſo. But Sir Edward Coke ‡ on

* Commentaries.—Book 2d, ch. 3. ſ. 7.

† Commentaries.---Book 2d, ch. 3. ſ. 2 & 3.

‡ Coke Litt. fo. 122. &c.

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the contrary says "a man may prescribe to have *separalem piscariam* in such a water, and the *owner of the soyle shall not fish there*; but if he claim to have *communiam piscariæ* or *liberam piscariam*, the owner of the soyle shall fish there."

It is not any part of my present plan to attempt a reconciliation of the different sentiments of these two great men, but you will find the point argued with much ingenuity by Mr. Hargrave, in a note to his edition of the *first institute*, and which for your satisfaction on this head I have added below.* I gather however from the terms *free fishery* and *several*

* According to this passage (that is the passage quoted above from Co. Litt.) ownership of the soil is not necessarily included in a *several* fishery, and *common of fishery* and *free fishery* are the same thing. But one, whose works will be admired, as long as a good taste for literary compositions or gratitude for the pleasure and instruction derived from them shall have any influence, gives a very opposite explanation; for according to him, ownership of soil is *essential* to a *several fishery*, and a *free fishery* differs both from *several fishery* and *common of fishery*, from the former by being confined to a *public* river and not *necessarily* comprehending the soil, from the latter by being *exclusive*. But we doubt whether that distinction may not be in a great degree questionable, 1. In respect to *several fishery* where is the inconsistency in granting the *sole* right of fishing with a reservation of the soil and its other profits? Bracton expressly takes notice of such a grant, for his words are, that one may *servitutem imponere fundo suo, quod quis possit piscari cum eo, et ita in communi, vel quod alius per se ex toto*. Bracton fo. 208, b. There are also numerous other authorities for it; the old books of entries agreeing that one may prescribe for

ſeveral fiſhery occurring in our law books that an *excluſive right* to the fiſheries in this kingdom, by whatever name it may be diſtinguiſhed has always been recognized by our law, and is allowed to have exiſted from the earlieſt period of our legal hiſtory. And that in "freſh rivers of what kind ſoever" ſuch excluſive right was in the time of

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a *ſeveral fiſhery* againſt the owner of the ſoil, nor do we underſtand why a *ſeveral piſcary* ſhould not exiſt without the ſoil as well as a *ſeveral paſture* as to which latter the doctrine is ſettled. The chief reaſons which occur againſt Lord Coke ſeem to be theſe. Several writs never applicable except to the ſoil lie for a piſcary; ſuch as a *præcipe quod reddat*, *monſtraverunt de rationabilibus diviſis*, and *treſpaſs*. *Suum liberum Tenementum* is a good plea to treſpaſs for fiſhing in a *ſeveral piſcary*. The ſoil will paſs as it is ſaid by the grant of a piſcary. But all theſe objections may be repelled. The writs relied on will not always lie for a piſcary. Thus if a *præcipe quod reddat* is brought of a piſcary in the water of another perſon, the writ is bad, and a *quod permittat* is the proper remedy. Beſides in the caſes of actions for treſpaſs in a *ſeveral piſcary* or at leaſt in ſome of them, the writ ſeems in effect to ſtate a *ſeveral piſcary* in the *plaintiff's own ſoil* which therefore proves nothing as to the ſenſe of *ſeveral piſcary* without further explanation. The plea *liberum Tenementum* may be replied to by preſcribing for a *ſeveral piſcary*. "For which Mr. Hargrave refers to books before cited as to ſuch a preſcription and then adds, "Though the grant of a piſcary, *generally may* perhaps paſs the ſoil, yet it will not, if there are any words to denote a different intention, as where one ſeiſed of a river grants a *ſeveral fiſhery* in it, and much leſs will the ſoil paſs when there is an expreſs reſervation of it." Hence, as it ſhould ſeem, the arguments are ſhort of the purpoſe; for at the utmoſt they only prove, that a *ſeveral piſcary* is *preſumed* to comprehend the ſoil 'till the contrary appears which is perfectly con-

of Edward 1ſt. held to be veſted by the common law of this land in the owners of the ſoil adjacent. And being ſo held at that time it ſeems ſuperfluous to add that the law muſt have been the ſame at and before the making of 9 Hen. 3d. a period of ſixty-five years only having elapſed between that con-

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conſiſtent with Lord Coke's poſition, that they may be in different perſons and indeed appears to us the true doctrine on the ſubject. 2. Both parts of the deſcription of a *free* fiſhery ſeem diſputable. Though for the ſake of diſtinction, it might be more convenient to appropriate *free fiſhery* to the franchiſes of fiſhing in *public* rivers by derivation from the Crown; and though in other countries it may be ſo conſidered; yet from the language of our books it ſeems as if in our law, practice had extended this kind of fiſhery to *all* ſtreams whether *private* or *public* neither the regiſter nor other books profeſſing any diſcrimination. Again, it is true that in one caſe the Court held *free fiſhery* to import an *excluſive* right equally with *ſeveral piſcary*, but then this was only the opinion of two Judges againſt one who ſtrenuouſly inſiſted, that the word *libera ex vi termini* implied *common*. And that many judgments and precedents were founded on Lord Coke's ſo conſtruing it. That the diſſenting Judge was not wholly unwarranted in the latter part of his aſſertion appears from two determinations a little before the caſe in queſtion, We may add to this three caſes cited by Lord Coke as of his own time; and that there are paſſages in other books which favour his diſtinction." Mr. Hargrave after quoting in the progreſs of the above very curious note, many authorities, which I have purpoſely omitted here concludes thus, " Theſe remarks on *ſeveral* and *free fiſhery* may ſerve the Student as a notice of the *doubts* on the ſubject, and alſo aſſiſt in any future diſcuſſion for removing them." Co. Litt. 13, Edward 126, b.

confirmation of the great charter, and the determination mentioned in the record above quoted.*

II. Secondly, I am to consider how that common law right, which I have attempted to establish, was affected by the 16th chapter of the confirmation of Magna Charta, 9, Hen. 3, and humbly to offer an explanation of that chapter, different from what is given in the second institute.

The best exposition of our antient laws is to be derived from the contemporary history of the times in which they were made, and without that key, many of them and particularly Magna Charta would now be almost unintelligible, for it is by such knowledge only that we are able to ascertain what were the mischiefs then complained of, and which were meant to be prevented in future; this mode of interpreting laws has therefore always been adopted, and is now become a rule of interpretation in our law.† I may therefore safely apply it to the case before us.

* The 9, Hen. 3, was A. D. 1225, the 18, Edward 1st. was A. D. 1290.

† There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy; that is how the common law stood at the making of the act, what the mischief was for which the common law did not provide; and what remedy the Parliament had provided to cure this mischief.

Introduction to Commentaries s. 3.

It is known to every one conversant in English History, that the exactions and oppressions of some of our Kings soon after the Conquest, and the struggles of the people to preserve their *common law rights* gave rise to that celebrated bulwark of our liberties which we emphatically call *Magna Charta*. Amongst other *common law* rights which had been wantonly invaded, the common law right of fishing had not escaped the same regal spirit of encroachment, which planted and extended the forest laws. That this is the fact we learn from an article in the first charter of Hen. 3d. where we find the extension of the forest laws and the fencing of rivers spoken of together as a subject of complaint, and for the prevention of which a remedy is there promised by the KING.

It is also a rule in our law, that statutes made in *pari materiâ* are to be so construed as to support and throw light on each other, and for this reason I shall consider the chapter I have undertaken to explain, at the same time and together with a clause I have cited below from a prior charter of the same King.

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The 16th chap. 9, Hen. 3, as publiſhed in the 2d. inſtitute, runs thus, " Nullæ Ripariæ defendantur de cætero niſi illæ quæ fuerunt in defenſo tempore Henrici Regis avi noſtri et per eadem loca et eoſdem terminos, ſicut eſſe conſueverunt tempore ſuo;" and is thus commented on by Sir Edward Coke.

" *No owner of the banks of rivers ſhall ſo appropriate or keep the river ſeveral to him, to defend or barre others, either to have paſſage or fiſh there, otherwiſe than were uſed in the reign of King Henry the ſecond.*" The literal tranſlation would run thus: " *No banks of rivers ſhall for the future be fenced in, other than thoſe which were fenced in, in the time of King Henry our grandfather, and in the ſame places and with the ſame boundaries as they were in his time.*"

Sir Edward Coke in his commentary on the chapter of Mag. Charta, next preceeding that now under conſideration, and where the word " *Ripariæ*" alſo occurs, has taken great pains to eſtabliſh the true meaning of that word; and he there tells us that it is taken for " *Ripa*" which is " *extrema et eminentiur terræ ora, quam fluvius utrinque alluit.*" Why he choſe to give the ſame word a different meaning in the 16th chapter, from that he had ſo laboured in the 15th, is not eaſily to be accounted for. But that his etymology in the 15th chapter was the true

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one, I am not only inſtructed, as I conceive, by the hiſtory of the times, but alſo by the common ſenſe of the chapter.

What the hiſtory of this chapter is I have already partly ſhewn in ſpeaking of the general cauſe of the great charter being granted, and in addition thereto, I learn from * Hale, that the King had by his prerogative, an intereſt of pleaſure or recreation *in all rivers*, and BEFORE the ſtat. Mag. Chart. cap. 16, it was frequent for him to put, as well freſh as ſalt rivers, *in defenſe* for his recreation; that is, to bar fiſhing or fowling in a river, till the King had taken his pleaſure or advantage of the writ or precept "*de defenſione Ripariæ*," which anciently was directed to the Sheriff to prohibit *riviation* in any rivers in his bailiwic. After this he adds the forms of the writs, as uſed in *ſubſequent* times, which are limited in their operation to ſuch rivers *only* as had been fenced in for the *King's recreation* in the time of Henry 2d. But as he ſays this hath been long diſuſed, for it created great trouble to the country and very little benefit or addition of pleaſure to the King.

The prevention of the abuſe of this prerogative in future, was, as I contend, the true motive for introducing

* De Jure Maris.

producing this chapter into the charter. But, as Mr. Reeves, in his Hiſtory of Engliſh Law has obſerved, of the proviſions in the charters of Henry and Stephen, for the redreſs of grievances then exiſting, that they were not faithfully obſerved, ſo we learn from the MIRROR, which was written either in the reign of Edward 1ſt, or his ſon Edward 2d, that this royal promiſe in the charter now under conſideration was not ſo *ſacredly* adhered to as it ought to have been; for, as the author ſays, "This ſtatute (that is 16 Hen. 3d) is now out of uſe," car pluſors rivers ſont ore appropries et engarnies et miſe in defence que ſoilount eſtre * *commons a piſher* et uſer en temps le Roy Henry 2d.—Mirror cap. 5, ſ. 2.

That this prerogative of ſporting in the fiſheries of his ſubjects had been extended, and the privilege it afforded abuſed by *King John* in particular, we are authorized to ſay from the very words of the charter of 1ſt Hen. 3d, where we find the following clauſe: "*Omnes Foreſte que afforeſtate ſunt tempore Regis Johan-*

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* Theſe words "*commons a piſher*" muſt be underſtood in their legal ſenſe, and as meaning only *common of Piſcary*, which we have ſeen is a liberty of fiſhing in another's water, as common of Turbary is a liberty of digging turf upon another's ground, and are by no means co-extenſive in their meaning with the "*public privilege*" of the Henley Aſſociation, and which they ſay is *common to all*.

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nis patris noſtri ſtatim de afforeſtentur et ita fiat de ripariis que per eundem Johannem tempore ſuo poſite ſunt in defenſo. *

Now if the rule I have quoted, and which obtains in our law for the conſtruction of ſtatutes made in *pari materiâ*, may be depended on in this caſe, the grievance complained of in the 9th Hen. 3d. reſpecting the putting rivers in defence, muſt neceſſarily be underſtood to mean *a like grievance* with that mentioned in the 1ſt Hen. 3d. and which I have ſhewn in the very words of that charter was occaſioned by *King John* himſelf, in ſtretching his prerogative, or privilege of ſporting in the fiſheries of his ſubjects, and not as the Commentary of Sir Edward Coke would ſeem to infer, the appropriation by any *ſubject* of what was before in common.

The *hiſtory* of this chapter appears to be ſtrongly in favour of the conſtruction I contend for, and I truſt I ſhall have the *common ſenſe* of it alſo on my ſide. In order to aſcertain this I ſhall firſt explain the nature of the grievances, as it is deſcribed by Sir Edward Coke, and which was ſimply this:—A complains that B has *fenced* in a public river, and

* Blackſtone's edition of the Charters in Law Tracts, vol. 2.

thus

thus *appropriated* to himſelf a fiſhery to which B has an equal right; and the remedy B takes to do himſelf juſtice is to complain to the King and get a clauſe inſerted in a charter then about to be granted for the reformation and correction of certain abuſes of the *prerogative*, in order to prevent ſuch appropriations in future. I mean not to throw an air of ridicule on any thing that has dropped from the pen of this great man, but may I not aſk, would not a common law action have been a more natural remedy for ſuch an injury done by one ſubject to another? It appears to me it certainly would, and that there could be no more reaſon or *common ſenſe* to apply for the extraordinary remedy of a charter, or act of Parliament, *than* there would be *now* in a caſe of the like nature.

This is the explanation then I would wiſh to eſtabliſh of this 16th chap. Hen. 3d. and I am not conſcious of having in the ſupport of it, advanced any argument, of the truth of which I do not at preſent feel the conviction; yet a different explanation having been acquieſced in ſo long, and adopted by ſucceſſive writers of eſtabliſhed reputation, I cannot but be apprehenſive that I may incautiouſly have fallen into a train of thinking which has miſled the little judgment I have, and made me view the ſubject only in that light which favoured the eſtabliſhment of my ſyſtem; a thing perhaps not very uncommon,

common, and ſhould it be proved to have been my caſe, I ſhall thankfully receive the correction of the more judicious.

III. 3dly. I am to produce ſome modern authorities in which the ancient common law right to the fiſheries in public rivers hath been recognized and eſtabliſhed.

It will perhaps facilitate the underſtanding of the law on this ſubject in its application to any particular caſe, to conſider whether the river in queſtion is *naturally navigable* or has been made ſo by *artificial means*, for in the latter caſe, the definition of Sir Matthew Hale as to the common law right of fiſhing will apply, (as I hope to prove) to ſuch *artificial navigations* as comprehended within his deſcription of *freſh rivers of what kind ſoever*; but as to rivers *naturally navigable*, it will appear, as well by a caſe determined by *Hale* himſelf, as by ſubſequent determinations, that the "*prima facie*" right is in the public at large and not in the owners of lands on the banks. But it is only the *prima facie* right that is even there affected; for an *excluſive proprietary* right to the fiſheries in rivers *naturally* navigable is capable of being ſupported by competent evidence.

I ſhall perhaps be better underſtood if I put a caſe by way of explanation.—Suppoſe A to be a

private

private river, in which as I have ſhewn the right of fiſhing belongs to the owners of the banks adjacent. If this river ſhould be made *navigable* by locks and other artificial means, would that circumſtance alone *diveſt* the owner of the banks of ſuch his *primâ facie* right and give it to the public at large? I am authoriſed by *Hale* to ſay it would not. The right to the fiſhery would remain undiſturbed, and the river would only become *public quoad* the navigation.

In producing the modern deciſions on this ſubject, it is my intention to ſtate them here as briefly as poſſible, as ſome of them will be given at large in the appendix to this letter.

The caſe mentioned to have been decided by *Hale* is in 1 Mod. 105, * and was concerning the excluſive right of fiſhing in the river *Wallfleet*, ‡ which is a navigable river, and the opinion of the court in favour of the public is there founded on the diſtinction between *navigable* or *public* rivers and *private* ſtreams.

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* Appendix No. 2.

‡ *Wallfleet*, now called *Wellfleet*, is part of *Blackwater Bay* on the coaſt of Eſſex, where the oyſters of that name are collected.

The judgment in the caſe of Smith and Kemp, 5 W. & M. in K. B. as reported in Salkeld 637, and in Carthew 286, proves only that the owner of a *free fiſhery* may maintain an action of treſpaſs againſt ſtrangers who fiſh there.

In Warren v. Matthews, Hil. 2. Ann. B. R. Holt Chief Juſtice held that the ſubject had a right to fiſh in all navigable rivers, as he he had in the ſea, and directed a quo Warranto to try the title of the plaintiff who claimed *ſolam Piſcariam* in the river *Ex* by a grant from the crown.

From Holt's opinion in this caſe we may collect the juſtneſs of the diſtinction above laid down concerning navigable rivers, the fiſhery in which is primâ facie in the public at large, and cannot be appropriated without competent legal evidence to ſupport ſuch appropriation.

There are ſome other caſes which were determined about the ſame time with thoſe I have quoted above, and one other ſubſequent to them, 14 & 15 Geo. 2d. in C. B. but I have not met with any report of that caſe.

The caſe of Carter and another againſt Murcott* and another, reported in 4 Burn Hil. Term 8 Geo. 3d. will deſerve a more particular notice than any of the

* Appendix. No. 3.

the others, as it recognizes the determinations of the court, upon former caſes.

By the judgment of the court in this cauſe, the following points ſeem fully eſtabliſhed:

1. In rivers *not* navigable, the *proprietors of the land* have the right of fiſhery on their reſpective ſides, which generally extends *ad filum medium aquæ*.

2. In *navigable* rivers, the proprietors of the land on each ſide have it *not*: the *fiſhery is common*: it is *primâ facie* in the *King*, and *is public*.

3. * If any one claims an *excluſive right of fiſhing* in a *navigable* river, he muſt *ſhew ſuch right*.—If he can ſhew a right by *preſcription* he may *then* exerciſe an excluſive right: though the *preſumption is againſt him*, unleſs he can *prove* ſuch a *preſcriptive right*.

4. That in the preſent caſe it was claimed, and *found*. It was therefore conſiſtent with all the caſes "*that one may have an excluſive privilege of fiſhing although it be in an arm of the ſea.*"—Such a right

* The curious reader will find in the treatiſe of Sir Mat. Hale, which I have ſo often quoted, this point fully gone into, and the doctrine of the preſent venerable Chief Juſtice firmly eſtabliſhed on the baſis of the *old law*.

ſhall not be *preſumed*, but the contrary, *primâ facie*; but it is *capable of being proved*, and was ſo in that caſe.

The principal point in the laſt caſe, and ſome others relating to the ſubject, were afterwards obſeved upon and admitted by the court as eſtabliſhed law, in the caſe of Seymour and others againſt Lord Courtenay and others, on a motion for a new trial in Michaelmas term. 12 Geo. 3, in the King's Bench.

From the judgment in Carter and Murcott, the neceſſity of diſtinguiſhing between *navigable* rivers and thoſe *not navigable* is again made evident; and I ſhall therefore bring together ſuch obſervations as have occurred to me on this branch of my ſubject.

In the act of the 11th of the preſent King "For improving and completing the navigation of the rivers *Thames* and *Iſis* from the city of *London* to the town of *Cricklade* in the county of *Wilts*," It is enacted that it ſhall be lawful for every perſon having a right or privilege to fiſh with nets or bucks in any part of the ſaid rivers, to retain, poſſeſs and enjoy the ſaid right and privilege of fiſhing at all ſeaſonable times of the year, any thing in the ſaid act contained to the contrary notwithſtanding.

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By another ſection of that act the maſter and owner of veſſels employed on the ſaid rivers are made liable to an action of treſpaſs for fiſhing with nets or otherwiſe; and there is alſo a general ſaving clauſe of the rights of all perſons whomſoever.

The legiſlature undoubtedly were of opinion at the time of paſſing the above act that there did exiſt ſuch rights to the fiſheries in the Thames as might be protected by the clauſes inſerted for that purpoſe, but the act is ſilent as to the particular nature of ſuch right.* In the preamble to the preceeding act of 24th of Geo. 2d. for regulating the ſame navigation, the rivers Thames and Iſis are declared to have been *time out of mind navigable* from the city of London to the village of Bercott in the county of Oxford, and from the city of Oxford weſtward beyond Lechlade.

If the words "time out of mind" occurring in this act ſhould be thought equivalent in their meaning to "time whereof the memory of man runneth not to the contrary" and which in their legal import comprehend the long period between the reign of Richard 1ſt. and the preſent time, that

* As a new act is intended to be petitioned for in the next ſeſſion of Parliament, perhaps theſe rights may then be more preciſely defined than they have yet been.

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is almoſt 600 years,* the Thames muſt be included amongſt the rivers that are *naturally* navigable, for I doubt whether *locks* or any other artificial mode of making rivers navigable have been ſo long known in this kingdom.

Dr. Campbell,† ſpeaking of the utility and convenience of the navigable rivers of this kingdom, has the following paſſage "The three famous navigable rivers in South Britain *Thames*, *Severn* and *Trent* afforded in all ages ſuch apparent proofs of utility and convenience, and the benefits derived from them were ſo numerous and ſo obvious that *through a long ſeries of years* they were conſidered as abſolutely perfect in their *natural ſtate*, ſo that no further attention was paid to them than was requiſite to keep them free from incumbrances and for the preſervation of their fiſh." The words "through a long ſeries of years" are not ſo appropriate in their meaning as the legal expreſſion of "time whereof the memory of man runneth not to the contrary," but perhaps if adopted on this occaſion may be nearer the truth. At this time of day the *Thames* in its *natural* ſtate, and without the aſſiſtance of locks, would not be conſtantly navigable within many

* Blackſtone's Commentaries. Book 2, cap. 3d.

† Political Survey of Great Britain, vol. 2, p. 257.

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miles of Bercott, and from hence I ſhall preſume that before the invention of locks, within the diſtrict to which the ſeveral acts I have quoted extend, it could not rank in the number of *navigable* rivers in the ſtrict acceptation of the term *navigable*—for the mere paſſage of a boat or a barge along a ſtream could never have been thought ſufficient to raiſe that ſtream, however ſmall or inconſiderable, into a *navigable* river, if it ſhould there would then be no room for any diſtinction to be made, between *navigable ſtreams* properly ſo called and thoſe not ſo with reſpect to the ſubject I am now treating of, and I therefore cannot ſuppoſe ſo great an abſurdity to be countenanced by our law.

In the caſes quoted above, the waters which were the objects of thoſe litigations were all rivers *naturally navigable*, therefore the diſtinction I am endeavouring to eſtabliſh did not *neceſſarily* occur nor at all influence the determinations of the court upon them.

In the paſſage quoted above from *Bracton*, if the word "* Flumina" in the beginning of it may be con-

* If a ſtream be not large enough to bear boats or ſmall veſſels, loaden; it is properly called in Engliſh by the diminutive, *Rivulet* or *brook*: by the Latins *Rivus*, and the French *Riviere*. If it will only bear ſuch veſſels, the Latins call it *Amnis*. If it be conſiderable

conſtrued "navigable rivers," then the latter part of it where he ſpeaks of them as *perpetual*, need not be at all ſtrained to convey the meaning I have there given it, and this conſtruction, upon a little conſideration, will appear to be neceſſary to make the whole of the paſſage conſiſtent, for having joined "*flumina*" with "*portus*" in the former part, I therefore think the "perennial rivers" he afterwards mentions, muſt neceſſarily be referred to ſuch *rivers* as by their immediate connection with *ports* and *harbours* that is by the conſtant flux and reflux of the *ſea* in them, are made *perpetually* navigable.

I mean not to ſpeak *dogmatically* on this or any other branch of my ſubject, the hints I have thrown out may poſſibly lead to a fuller inveſtigation of the ſubject by ſome more able hand, when an opinion may be more ſafely formed; and if the diſtinction I have attempted to make between navigable rivers which are *naturally* ſo, and thoſe which have been made ſo by artificial means, for the purpoſes of inland commerce ſhall appear to be well founded, the following concluſions will then

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rable enough to carry larger veſſels, it is called by the general name *river*; by the Latins *Fluvius* and *Flumen*.

Chambers's Dictionary, article River.

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neceſſarily reſult from what I have brought together on this head.

1ſt, That as well in rivers made *navigable by artificial means*, as in *private* ſtreams, the *primâ facie* right to the fiſheries is *generally* veſted by our common law in the owners of the lands adjacent.

2d, That in rivers *naturally navigable*, altho' the primâ facie right to the fiſheries is in the public at large, or is a "privilege common to all," yet even in theſe, and alſo in arms of the ſea, ſuch right is capable of being appropriated.

IV. I am now in the fourth and laſt place to point out ſome errors which have been entertained on the ſubject of this letter, and endeavour to correct them, which I will do as briefly as poſſible, having incidentally touched upon them before in the progreſs of this letter.

A paſſage in Sir Wm. Blackſtone's Commentaries has been thought, for want of making the diſtinctions which I have before ſhewn to be neceſſary reſpecting our public rivers, to have encouraged thoſe errors I mean to examine. The paſſage I allude to is as follows: "*A free fiſhery, or excluſive right of fiſhing in public rivers is a royal franchiſe*, and is conſidered as ſuch in all the countries where the

feodal polity has prevailed; though the making ſuch grants, and by that means *appropriating* what ſeems to be unnatural to *reſtrain*, the *uſe of running water*, was prohibited for the future by King John's great charter; *and the rivers that were fenced in his time* were directed to be laid open, as well as the foreſts to be diſafforeſted. This opening was extended by the ſecond and third charters of Hen. 3d. to thoſe alſo that were fenced under Rich. 1ſt, ſo that a franchiſe of free fiſhery ought now to be at leaſt as old as the reign of Henry 2d. And afterwards he adds "the conſidering ſuch right as originally a flower of the prerogative 'till reſtrained by Magna Charta, and derived by royal grant (previous to the reign of Rich. I.) to ſuch as now claim it by preſcription may remove ſome difficulties in reſpect to this matter, with which our books are embarraſſed."*

Whilſt the queſtion reſpecting the time of introducing the feudal law into this kingdom † remains

* Blackſtone's Commentaries. Book 2, chap. 3.

† Lord Coke, Selden, Nathaniel Bacon, Sir Roger Owen and Tyrrell, are of opinion that tenures were common among the Saxons. Crag, Lord Hale, Somner, Sir Henry Spelman, Dr. Brady, and Sir Martin Wright are of opinion that feuds were firſt brought in and eſtabliſhed by the Conqueror. After this difference of opinion, ſome late writers have taken a middle courſe.

mains enveloped in ſo much doubt and uncertainty, that part of the above extract which refers to the feudal polity, and the countries in which it prevails may be laid out of the queſtion, and more eſpecially as Blackſtone himſelf does not allow of any thing more than a qualified or improper ſyſtem of feuds having been received here prior to the time of William 1ſt.

The record relating to the fiſhery of the river Idell, which I produced in the former part of this letter, proves incontroſtably what was held in our courts to be the common law right to the fiſheries in freſh rivers in the time of Edward 1ſt and which muſt have exiſted here as ſuch prior to the Norman invaſion, and therefore was not at all affected by the *feudal law*, whatever may have been the period of its introduction into this country.

Sir Edward Coke, in the proeme to the ſecond inſtitute, ſays that Magna Charta in many inſtances reſtored the common law rights of the ſubject. Now the common law right to the fiſheries "in

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courſe. Blackſtone, Dalrymple, and Sullivan endeavour to compromiſe the diſpute by admitting an *imperfect* ſyſtem of feuds to have ſubſiſted before the conqueſt. See alſo on the ſubject of this note Reeves's Hiſtory of Engliſh Law. Chap. 1.—Commentaries 2d vol. Chap. 4.—Wright's Tenures. Chap. 2.

freſh rivers, of what kind ſoever" in this kingdom, has been ſhewn from Hale to be in the owners of lands on the banks of thoſe rivers, and the prerogative of the crown to have extended with reſpect to the fencing of thoſe rivers only to a temporary uſe of the fiſheries in them, and for the ſake merely of *the King's* diverſion. There does not therefore appear any neceſſity whatever to have recourſe to the feudal law to account for that prerogative which our kings might by *our common law* have exerciſed in the fiſheries of their ſubjects in "freſh rivers of what kind ſoever." But if by the *public rivers* mentioned by Blackſtone we are to underſtand ſuch rivers as are called in Bracton *perennia*, and which I have endeavoured to ſhew, muſt mean rivers *conſtantly* and *naturally navigable* by reaſon of their contiguity to or being affected by the flux and reflux of the ſea, it would be needleſs to contend further on the ſubject.

Sir Matthew Hale's definition of the common law right extends only to "FRESH rivers of *what kind ſoever*," the *primâ facie* right to the fiſheries in ſuch public rivers as are *naturally navigable*, being allowed on all hands to be in the public at large.

Blackſtone ſeems to lean againſt an excluſive right when he ſays it is unnatural to reſtrain running

run water, but the reſtriction and appropriation of running water will not be at all effected by eſtabliſhing an excluſive right to the *fiſheries* in "freſh rivers;" the running water in them would continue ſtill *free* and *open* for every *public* purpoſe of navigation and carriage; *

As to the direction in the charter of King John for laying open the rivers that were fenced in his time, the charter 1 Hen. 3d. quoted above, proves that the fences there alluded to, had been ſet up by King John himſelf, and were an encroachment made by him on the common law right of the ſubject, under pretence of prerogative; and on that account it found a place in the great charter, amongſt other grievances of the like nature there complained of, and proviſion was made for the prevention of it in future, and for the reſtoration of their common law right to the people.

Now if the fences complained of were ſet up by our Kings in excluſion of the right of the ſubject, and were not encroachments either by the people on one another, or on the eſtabliſhed prerogative of the crown, and the deſtruction of *ſuch fences* was directed as a means of reſtoring the common law right of the ſubject, and which Sir Edward Coke ſays was one of the principal operations of Mag. Charta, then there will not appear a neceſſity that

* Hale de Jure Maris.

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a franchiſe of free fiſhery "in freſh rivers" ought now to be at leaſt as old as the reign of Hen 2d. neither need it be at all conſidered as a royal franchiſe, nor conſequently is there any neceſſity to produce a grant from the crown for the ſupport of it in ſuch rivers.

The diſtinctions then which might be made in reading this part of the Commentaries, reſpect public rivers that are *naturally and conſtantly navigable*, and freſh rivers, which, although now made public, are not *naturally navigable*. And by this means the paſſage in Blackſtone which has been relied on as as argument in favour of the public right of fiſhing, will be found not to affect the excluſive right to the fiſheries in *freſh* rivers, although it coincides exactly with the law as ſettled concerning *public* rivers which are *naturally* navigable; and the difficulties therefore occurring in our books, may perhaps be more ſatisfactorily ſolved, at leaſt with reſpect to the fiſheries in *freſh* rivers, by adopting the *definition* of Sir Matthew Hale, and the *diſtinction* I have ventured to make, than they would by conſidering thoſe fiſheries as univerſally derived from the crown.

It is ſaid alſo by thoſe who argue for the public right of fiſhing, that "all public ſtreams as well as commons and highways, do of common right belong

belong to the King," and *for this reaſon alſo* they contend that an excluſive right of fiſhing in ſuch ſtreams muſt be derived under a grant from the crown. In public rivers that are naturally navigable the neceſſity of a grant, or of ſuch a preſcription as implies one to ſupport ſuch excluſive right is admitted on all hands; but in freſh rivers although made navigable and therefore *for that purpoſe only public*, ſuch neceſſity does not exiſt. I do not deny but that even in *freſh rivers* ſome titles to the fiſheries therein may be found which are derived from royal grants; all I mean to contend for is, that it is not abſolutely neceſſary to have recourſe to ſuch evidence of a title upon all occaſions; on the contrary, I have been inſtructed that proof of the enjoyment of a fiſhery by the owner of an eſtate on the banks adjacent, and of his anceſtors or their tenants, under reſerved rents, is the ſtrongeſt evidence that can be produced in ſupport of ſuch right, and would prevail even againſt antient *records to the contrary.**

Perhaps if we were to enquire into the origin of

* *Trin. Term. 28 and 29 Geo. 2, 1755.* --- Farmer v. Arthur, 2d. Will. 23.--- In this caſe a preſcriptive right to *wreck on the ſea* was ſet up by plaintiff, and in ſupport of it he proved *uſage* for 92 years then laſt. The defendant produced in ſupport of his title three ancient records of the times of Edward 1ſt. and Edward 3d. and inſiſted that they proved that the uſage ſet up by the plaintiff muſt

titles to the fiſheries in *freſh rivers*, which are ſupported by royal grants in derogation of the common law, we ſhould find that thoſe *fiſheries* were either originally conveyed with ſome of the demeſne lands of the crown, to which they were appurtenant; or elſe with lands which had *eſcheated* to the crown, and were granted out again to ſome other individual: And if the proprietor of ſuch a fiſhery ſhould not now be owner of the banks, that difficulty would eaſily be ſolved by ſuppoſing that either at the time of the original grant, or elſe at ſome ſubſequent period, the lands had been ſevered from the fiſhery, and had deſcended differently. This hypotheſis is by no means improbable, but is much countenanced by what we are told in the Commentaries reſpecting the right of free warren.* In caſes where the demeſne lands of the crown lay on the banks of freſh rivers, why might not the right to the fiſhery in thoſe caſes

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muſt have commenced within the time of memory, *ſince the reign of Richard 1ſt.* But the court all agreed that *uſage for 92 years* was ſufficient proof of the plaintiff's right, and gave judgment accordingly.

* There are many inſtances of keen ſportſmen in antient times, who have ſold their eſtates and reſerved the free warren, or right of killing game to themſelves, by which means it comes to paſs that a man and his heirs have ſometimes free warren over another's ground. Commentaries, Book 2d, chap. 3d.

ariſe

ariſe from the *common law*, as laid down by Hale, and not by virtue of the prerogative, and the grantee in ſuch caſe take the fiſhery not as a royal franchiſe, but as an incorporeal hereditament conveyed to him by the common ſpecies of conveyance uſed by the crown in like caſes?

Public ſtreams as well as highways do certainly belong to the crown, but in an *eſpecial manner only*, and as common highways on land are called "*Altæ viæ regiæ*, ſo public rivers for public paſſage are called *Fluvii regales*, and *haut ſtreames le Roy*, not in reference *to the property of* the river, but to the public uſe, all things of public ſafety and convenience being in a ſpecial manner under the King's care, ſupervifion, and protection,"*—and with this extract from Hale, to whom I have been ſo much indebted in the progreſs of this letter, I ſhall conclude, without making any comment on it, as nothing can be added by me which would not in ſome degree cloud that perſpicuity which ſo eminently pervades all the writings of its admired author.

If the hints I have brought together, however ſuperficial they may be, ſhall be thought worthy

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* Hale de Jure Maris.

the attention of the more judicious, and incite them to a fuller and more accurate inveſtigation of the ſubject, I ſhall feel a pleaſure in having contributed even in ſo humble a degree to the information of the public; but I ſhall not enter into any literary diſpute with thoſe who may differ with me in opinion, and reply to this letter; whatever alteration may be produced in my ſentiments, will no otherwiſe be publiſhed, than as it may affect my future conduct in my profeſſion.

I am, Sir,

Your moſt humble Servant,

Reading, Oct. 1, 1787. H. H

APPENDIX.

No. I.

The following is an Extract from the Adverisement alluded to in the foregoing Letter, and was first published in the Reading Mercury of the 14th of May, 1787.

ASSOCIATION,

For the Public Right of Fishing in the River Thames.

AT a numerous and respectable meeting of gentlemen, at the White Hart Inn, Henley upon Thames, convened for the purpose of taking into consideration the most effectual means of supporting the public privilege of fishing, and for suppressing the present shameful and illicit practice of taking fish out of season, and with unlawful nets.

Resolved, That it is the sense of this meeting, that the right of fishing in the river Thames, is a public privilege, and common to all.

No. II.

APPENDIX.

(No. II.)

1ſt. Mod. 105.

ANONYMOUS,——3 Keb. 242.

A Trial at Bar concerning the River of Wallfleet.

THE queſtion was whether —— had not the right of fiſhing there excluſive of all others. Hales. In caſe of a private river, the Lord's having the ſoil is a good evidence to prove that he hath the right of fiſhing; and it puts the proof upon them that claim liberam piſcariam. But in caſe of a river that flows and reflows, and is an arm of the ſea, there primâ facie, it is common to all; and if any will appropriate a privilege to himſelf, the proof lieth on his ſide; for in caſe of an action of treſpaſs brought for fiſhing there, it is primâ facie a good juſtification to ſay, that the locus in quo is brachium maris, in quo unuſquiſque ſubjectus domini Regis habet & habere debet liberam piſcariam.—In the Severne there are particular reſtraints, as gurgites, &c. but the ſoil doth belong to the Lords on either ſide, and a ſpecial ſort of fiſhing belongs to them likewiſe, but the common ſort of fiſhing is common to all.—The ſoil of the river of Thames is in the King; and the Lord Mayor is conſer-

conſervator of the river, and it is common to all fiſhermen: and therefore there is no ſuch contradiction betwixt the ſoil being in one, and yet the river common for all fiſhers, &c.

(No. III.)

CARTER and ANOTHER,

VERSUS

MERCOT and ANOTHER.

THIS was an action of treſpaſs for breaking and entering the plaintiff's cloſe called the river, or the river Severn. The defendant pleaded that it is a navigable river; and alſo that it is an arm of the ſea, wherein every ſubject has a right to fiſh. The plaintiff (without traverſing the allegation) replied, that this was part of the manor of Arlingham; that Mrs. Yates was ſeized of that manor; and preſcribes for a ſeveral fiſhery there. Iſſue being joined thereon; a verdict was found for the plaintiff.

On Monday 9th of November, Mr. Aſhurſt on

on behalf of the defendant, moved in arreſt of judgment, and had a rule to ſhew cauſe.

He objected that though the fact was ſo found, yet the law is otherwiſe; viz. that every one has a right to fiſh in a navigable river, or in an arm of the ſea. He cited 1 Mod. 105. Anonymous 6 Mod. 73. Warren verſus Matthews. 1 Salk. 357, S. C. and Ward verſus Creſwell, C. B. 14 & 15 G. 2, which recognizes (1 Mod. 105.

Mr. Serjeant Nares, for the plaintiff, now ſhewed cauſe.

It is not an arm of the ſea where the ſea flows and reflows; but part of a manor.

It is found to be in the manor of Arlingham, in the county of Glouceſter. And a place may be parcel of a manor, if between the high and low water marks; though the ſea flows and reflows upon it. So is Sir Henry Conſtable's caſe, 5 Co. 107. a Bracton, lib. 2, c. 12.

Mr. Aſhurſt contra for the rule,

An excluſive right cannot be maintained by the ſubject, in a river that is an arm of the ſea: The general

general right of fiſhing in an arm of the ſea is common to all.

The replication ought to have ſhewn that this was a ſeparate pool: but the plaintiff cannot maintain a general right in the river, in excluſion of all other the King's ſubjects.

In Sir Henry Conſtable's caſe, the Admiral had juriſdiction between the high and the low water mark. When the tide is in, the water cannot belong to a manor: and a fiſhing can only be exerciſed when the tide is in, when there is water.

In Sir John Davy's Reports, p. 55.—The caſe of the fiſhery in the river Banne in Ireland. It is ſaid that the King has a right as high as the ſea flows and reflows, and an arm of the ſea, where the tide flows and reflows, is the ſame as the ſea itſelf. Juſtinian Inſt. lib. 1, c. 1. tit. 1.

6. Mod. 73. Warren verſus Matthews.—Every ſubject, of common right, may fiſh with lawful nets, &c. in a navigable river, as well as in the ſea; and the King's grant cannot bar them thereof. 1 Salk. 357. S. C. Per Holt. Chief Juſtice.—"The ſubject has a right to fiſh in all navigable rivers, as he has to fiſh in the ſea.

1 Mod:

1 Mod 105 Anon. In case of a river that flows and reflows, and is an arm of the sea, Hale says "the right of fishing is primâ facie, common to all."

Lord Mansfield——The rule of law is uniform.

In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides: and it generally extends, ad filum medium aquæ.

But in navigable rivers, the proprietors of the land on each side have it not; the fishery is common: It is primâ facie, in the King, and is public.

If any one claims it exclusively, he must shew a right. If he can shew a right by prescription, he may then exercise an exclusive right: though the presumption is against him, unless he can prove such a prescriptive right.

Here it is claimed, and found. It is therefore consistent with all the cases, "that he may have an exclusive privilege of fishing, although it be an arm of the sea." Such a right shall not be presumed; but the contrary, primâ facie; but it is capable of being proved, and must have been so in the present case.

Mr. Justice Yates.—I was concerned in a case of

of this kind. Such a claim was made, but the claim failed, because it there happened that ſuch a right could not be proved: therefore it was in that caſe determined that the right of fiſhing was common. But ſuch a right may be proved. By the law of England, what is otherwiſe common, may, by preſcription, be appropriated. Grotius owns, that navigable rivers may be appropriated.

The cited caſe proves only this diſtinction, "That navigable rivers or arms of the ſea belong to the crown, and not (like private rivers) to the land owners on each ſide:" And therefore the preſumption lies the contrary way in the one caſe from what it does in the other. Here indeed it lies, primâ facie, on the ſide of the King and the public: But it may nevertheleſs be appropriated by preſcription.

The caſe of the royal ſalmon fiſhery in the river Banne, in Sir John Davy's Reports, is agreeable to this; and 'tis a very good caſe. It appears by it, that the crown may grant a ſeveral fiſhery in a navigable river, where the ſea flows and reflows, or in an arm of the ſea: and in the caſe of Abbotſbury, there mentioned, the court ſaid, "it muſt be intended that the Abby had originally had a grant from the crown." And in the caſe in Mod. 105, Hale ſays truly, "If any one will appropriate a privilege to himſelf, the proof lieth on his ſide."

Now if it be granted, it may be prescribed for: A prescription implies a grant. But it can't be presumed: It must be proved.

Why then may not this plaintiff prescribe for an exclusive right of fishing in an arm of the sea, and prove this appropriation, though the primâ facie presumption is contrary?

Mr. Justice Aston concurred. This is the true distinction. And 1 Mod 105 is in point.

RULE DISCHARGED.

APPENDIX.

(No. IV.)

A LETTER published in the St. James's Chronicle on the first of September, 1772, soon after the trial of the Cause between LORD CLIFFORD *and* LORD COURTENAY, *respecting a Right of Fishing in* Teingmouth Harbour.

THE cause between the two noble Lords tried at the last assizes for Devonshire, (mentioned in several public papers) being little understood, it will not, perhaps, be unacceptable to the public to be informed of the particulars of the dispute.

Lord Courtenay is owner of the manor of Kenton, which extends from Exmouth to Teingmouth, and ends in a point, or peninsula, called the Denn, forming part of the mouth of the harbour in the parish of East Teingmouth.

Lord Clifford is owner of the manor of Ringmore, which extends from the mouth of the river Teing several miles up on the St. Nicholas side, and also of the manor of West Teingmouth, which joins upon Lord Courtenay's manor of Kenton, and bounds the river as far as the parish of West Teingmouth runs.

Lord Clifford and his anceſtors claimed a ſeveral or excluſive right of fiſhing in the river, and alſo a privilege of landing their nets from high to low water, as well as in that part of the river that adjoins the Denn, as in thoſe parts that join the manors of Ringmore and Weſt Teingmouth. And this fiſhery and privilege had been lett from time to time by Lord Clifford and his anceſtors, reſerving to themſelves the oyſtery and right of fiſhing for their amuſement.

In Aug. 1780, Lord Courtenay came to Teingmouth, and Lord Clifford's tenants being fiſhing and landing their nets upon the Denn as uſual, Lord Courtenay directed his ſteward to cut the net, and forbid the perſons fiſhing there; and at the ſame time called the fiſhermen, who, till that time, had fiſhed in the ſea, without the Denn, to come and fiſh within; and thoſe men have continued to fiſh there ever ſince, under the protection of Lord Courtenay, and in drawing their nets they fiſhed as well in Lord Clifford's manors of Ringmore and Weſt Teingmouth, as in that part then claimed by Lord Courtenay.

Under theſe circumſtances Lord Clifford directed his tenants to bring two actions, one againſt Lord Courtenay and his ſteward, for cutting the nets, and the other againſt Lord Courtenay and

the fiſhermen, for fiſhing in their ſeveral and excluſive fiſhery.

To the laſt action Lord Courtenay and his co-defendants, by way of juſtification, pleaded that he had a free or concurrent right of fiſhery with Lord Clifford in Eaſt Teingmouth, as being part of his manor of Kenton, and that he had a like right to fiſh in Weſt Teignmouth, and St. Nicholas, as an appurtenant to his manor of Kenton; and moreover that the river Teing was a navigable river, in which every ſubject of this realm had the privilege to fiſh. In ſhort Lord Courtenay ſo diverſified his juſtification that (by the help of ſpecial pleading) he ſet up no leſs than ſixteen different defences.

The cauſe came on to be tried at the ſummer aſſizes in 1771; and on proving the demiſe by Lord Clifford to his tenants, it appeared Lord Clifford had reſerved the oyſtery, and a right to fiſh for amuſement, and the tenants having ſtated in their declaration that they were ſeized of the whole or excluſive fiſhery, an objection was taken on the part of Lord Courtenay that the plaintiffs claimed more than by their own ſhewing they appeared to be entitled to, and the Judge allowing the objection, the plaintiffs were nonſuited. The two noble Lords were then in court, and it was admitted on all ſides that the record would try

every

of the verdict, shewed their approbation by a general shout, and pushed out of court, and obliged a publican to light up his house, and the next day they attended at Teingmouth to partake of the fruits of their conquest. But then every thing was cool and quiet, the people had then learnt the effect of the verdict. They knew they never could fish at the Denn but at low water, and that any right they could derive under Lord Courtenay from this verdict, was of no more advantage than if they were to drag their nets upon Hall Down.

And supposing it should ultimately be determined that they might draw their nets to the middle of the stream, it would but very little, if any thing, mend the matter: and what was worse, that after all this merriment, Lord Courtenay was to pay the piper on both sides.

Yours &c.

A B

ERRATUM.—In page 32, line 18, for *and* read *but*.

FINIS.